Specifically, Petitioner seeks review of rulings by the United States Court of Appeals for the Eleventh Circuit that the domestic "transportation workers" exception set forth in 9 U.S.C. § 1 of the FAA conflicts with, and therefore is preempted by, the Convention and §§ 202 and 208 of the Convention Act.

The FAA, 9 U.S.C. §§ 1 *et seq.*, was enacted in 1925 as positive law to overcome a stubborn hostility in the United States judiciary against enforcement of arbitration clauses. *Circuit City Stores v. Adams*, 532 U.S. 105, 111 (2001). The FAA requires enforcement of arbitration clauses in any "maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. "[C]ommerce" and "maritime transactions" are defined in 9 U.S.C. § 1. That section goes on to state that "nothing herein contained shall apply to contracts of employment of seamen, railroad workers, or any other class of workers engaged in foreign or interstate commerce." *Id.* In *Circuit City* this Court held that this exception should be read narrowly in view of the broad and strong federal policy favoring arbitration, that employment contracts are "commercial" within the meaning of the FAA, and that the exception for workers engaged in commerce is limited to those "transportation workers" actually involved in the movement of goods. 532 U.S. at 118-19.

The Convention Act, 9 U.S.C. §§ 202-208, was enacted in 1970 to implement the United States' ratification of the Convention itself. *See* 9 U.S.C. § 201. The Convention Act evinces a federal policy in favor of arbitration in the international context which is as strong, if not much stronger, than arbitration in the domestic context. As federal courts have noted, where a party has made the bargain to arbitrate, the party should be held to it. "Throughout such an inquiry,

it should be kept in mind that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)(citations omitted). *Compare Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

The Convention Act states quite simply that an agreement to arbitrate falls under the Convention, "including" agreements covered by § 2 of the FAA. 9 U.S.C. § 202. The Convention in turn states:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration ... concerning a subject matter capable of settlement by arbitration. [***] [T]he courts of a Contracting State ... shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null, void or incapable of being performed.

Convention, Art. II, §§ 1, 3. There is no limiting language in the Convention, and the Convention Act limits the operation of the Convention merely to those relationships which are "commercial". 9 U.S.C. § 201 (HISTORICAL AND STATUTORY NOTES, n. 29).

Neither the texts nor histories of the Convention and the Convention Act suggest that their jurisdiction is limited exclusively to that of the FAA. To the contrary, the Convention Act states that Chapter 1 of Title 9 (the FAA) applies to cases governed by Chapter 2 of Title 9 (the Convention Act) only "to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208. Nothing in the Convention

or the Convention Act even remotely resembles the transportation workers' exception of the FAA. The courts below therefore correctly ruled that it cannot be read into the Convention Act.

2. Petitioner Presents no Compelling Reasons Calling for this Court's Involvement

Rule 10 of this Court's Rules of Procedure states that the Court will grant certiorari for only "compelling reasons." *S.Ct.R.* 10. Petitioner has presented this Court with no compelling reasons warranting review of the orders below.

Rule 10 lists examples of such "compelling reasons," most of which involve conflicts between a federal appellate opinion and opinions from 1) state courts of last resort, 2) other federal circuit courts of appeal, or 3) this Court itself. *S.Ct.R.* 10(a), (b). This case, however, does not present such a conflict - every federal judge known by Respondent to have addressed the question presented has agreed with the holding now before the Court: the "transportation workers exception" in 9 U.S.C. § 1 does not apply in situations governed by the Convention. *Lim v. Offshore Specialty Fabricators, Inc.*, 2005 U.S. App. LEXIS 4807 (5th Cir. 2005); *Bautista et al v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005); *Freudensprung v. Offshore Tech. Svc's, Inc.*, 379 F.3d 327 (5th Cir. 2004); *Francisco v. Stolt Achievement MT*, 293 F.3d 270 (5th Cir. 2002), *cert. denied*, 537 U.S. 1030 (2002).[1]

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[1] *Inting v. Carnival Corp.*, No. 03-21160 (S.D. Fla. 2004); *Adolfo v. Carnival Corp.*, 2003 U.S. Dist. LEXIS 24143, No. 02-23672 (S.D. Fla. 2003); *Acosta v. Norwegian Cruise Line, Ltd.*, Case No. 03-22060-CIV-KING, 303 F. Supp. 2d 1327 (S.D.Fla. 2003);

Petitioner apparently seeks review under *S.Ct.R.* 10(c). *Compare Pet.Brief* at 15 ("a final decision by this court would be important for seamen and shipowners") *with S.Ct.R.* 10(c)(a lower court "has decided *an important* question of federal law that has not been, *but should be*, settled by this Court")(emphasis supplied). Yet Petitioner has not explained why the question presented is so important as to warrant certiorari review by this Court or why this Court should address it. He does not raise an issue concerning the international relations of the United States, the operations of the federal government, or the federal treasury. He does not discuss how a decision by this Court would impact state or local governments, or the citizenry of the United States. He does not demonstrate how a decision by this Court would influence future activities by lower courts.

Petitioner does not even explain why or how an opinion from this Court will be important to "seamen and shipowners." By contrast, the vast majority of cruise line headquarters are located in, and the vast majority of cruise ships sail from, ports located in states covered by the Fifth and Eleventh Circuits (Texas, Louisiana and Florida). Other foreign shipowners utilize these ports as well. Those courts are in agreement. As such both foreign shipowners and citizens of the United States can readily order their legal and business affairs with confidence in the state of the law.

Bautista et al v. Star Cruises, Inc. 286 F.Supp.2d 1352 (S.D.Fla. 2003); *Santos v. Carnival Corp.*, No. 03-20914 (S.D. Fla. 2003); *Jaranilla v. Megasea Mar., Ltd.*, 2002 U.S. Dist. LEXIS 16505, No. Civ.A.02-2048, (E.D. La. 2002); *Amon v. Norwegian Cruise Lines, Ltd.*, 2002 U.S. Dist. LEXIS 27064, No. 02-21025 (S.D. Fla. 2002).

Rather, Petitioner's position is simply that as seamen they are "wards of admiralty" and they should receive special consideration in the context of international arbitration. Petitioner expressly invokes the historical solicitude which United States courts hold for seamen of the United States. *See Pet.Brief* at 14-15 (discussing Justice Story's famous opinion in the maintenance & cure case of *Harden v. Gorden*, 11 F.Cas. 480 (No. 6047)(C.C. D.Me. 1823)). As discussed below, Petitioner's reliance on the "wards of admiralty" theory is misplaced because it is a domestic policy which has no application to international cases within the jurisdiction of the Convention.

3. The United States' Historic Solicitude for its Domestic Seamen Has No Relevance to Cases Governed by The Convention

The United States' domestic policies spelled out so eloquently in *Harden* derive from its desire to promote its own domestic merchant marine and its own international commerce:

> Beyond this, *is the great public policy of preserving this important class of citizens for the commercial service and maritime defense of the nation. Every act of legislation which secures their healths, increases their comforts, and administers to their infirmities, binds them more strongly to their country*; and the parental law, which relieves them in sickness by fastening their interests to the ship, is as wise in policy, as it is just in obligation.

Harden, 11 F. Cas. at 483 (emphasis supplied). *Compare Hutchinson v. Coombs*, 12 F. Cas. 1083, 1086 (No. 6,955) (D.C. ME 1825). Unlike the implicit assumption advanced

by Petitioner, *Pet.Brief* at 10-11, no United States court has ever held that a non-U.S. seaman such as Petitioner is automatically entitled to avail himself of these domestic policies. *See Lauritzen v. Larsen*, 345 U.S. 571 (1953)(refusing to apply U.S. law to claim brought in U.S. court by a Danish seaman, even though his employer was doing business in this United States). Most significantly, numerous U.S. courts have recognized that domestic policies cannot have influence when deciding whether an arbitration clause should be enforced under the Convention. *Vimar Seguros, supra*, 515 U.S. at 539 ("If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-39 & n. 21 (1985); *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-517 (1974).[2]

The courts below correctly determined that the FAA's "transportation workers" exception is an example of a domestic protection which does not inure to the benefit of non-U.S. seamen in the international arena, particularly in the

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[2] *See also Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982)(refusing to recognize public policy statute enacted by the Commonwealth of Puerto Rico as a defense to enforcement of an arbitration clause governed by the Convention); *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l' Industrie du Papier (RAKTA)*, 508 F.2d 969, 973-74 (2d Cir. 1974)(construing narrowly the "public policy" defense to enforcement of awards under Article V(2) (b)); *McCreary Tire & Rubber Co. v. CEAT*, 501 F.2d 1032 (3rd Cir. 1974)(observing that there is "nothing discretionary" about enforcement of arbitration clauses governed by Article II(3) of the Convention).

arena of international arbitration. This Court has itself noted that this exception resulted from the lobbying of powerful *domestic* unions, at a time when Congress had already enacted statutes governing the resolution of disputes between domestic seamen and their employers. *See Circuit City*, 532 U.S. at 119-121. Notably lacking in the history of the exception or in the text of the statute itself is any concern for arbitrations involving foreign seaman, such as Petitioner.

Any policies enunciated in case law which demonstrate solicitation for *domestic* seamen are trumped by the Convention itself, which creates positive law in favor of enforcing arbitration agreements involving *foreign* seamen and which preempts any statute or case law before it. Petitioner has not pointed this Court (or any other court) to any item in either the texts or the histories of the Convention and Convention Act demonstrating that anyone – domestic or foreign – was concerned with the arbitration of claims by non-U.S. seamen.

Instead Petitioner attempts to create an air of confusion by invoking the testimony of Ambassador Richard Kearney, given when presenting the Convention Act to Congress. Ambassador Kearney explained that the United States was adopting the Convention for purposes of enforcing arbitration agreements in only those relationships which are "commercial" under the national law of the United States. *See Pet.Brief* at 7-8, 11-12. He indicated that the term "commercial" is defined in 9 U.S.C. §1. *Idem.* Because that statute also sets forth the transportation workers' exemption from the FAA, Petitioner concludes that seamen's contracts are not "commercial" and makes the sweeping, utterly unfounded assertion that "seamen's contracts are not subject to arbitration under the national law of the United States[.]" *Id.* at 9.

The conclusions Petitioner draws from Ambassador Kearney's testimony are mistaken in two aspects.[3] First, it contradicts the plain meaning of § 1. That statute does not state that transportation worker employment contracts are not "commercial"; it states only that the FAA does not apply to them. *See Circuit City*, 532 U.S. at 109 ("Section 1 of the Federal Arbitration Act *excludes from the Act's coverage* contracts of employment of seamen,... .")(emphasis supplied). *See also Id.* at 133 (Souter, J. dissenting)("§ 1 *exempts from the Act's coverage* 'contracts of employment of seamen,... .'")(emphasis supplied).[4] Indeed, this Court itself has already determined that employment contracts are "commercial" within the meaning of the FAA. *Id.* at 118-19.

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[3] Petitioner also mis-cites *Udall v. Tallman*, 380 U.S. 1 (1965) for the proposition that federal courts must give Ambassador Kearney's testimony "great deference". As the courts below noted, *Udall* held that federal courts should pay such deference to the "officers or agency charged with [the statute's] administration." *Pet.Brief* at 20a; *quoting Udall*, 380 U.S. at 16. Assuming that Ambassador Kearney was concerned in any way with enforcement of arbitration against foreign seamen – a proposition completely belied by the entirety of his testimony – he was not such an officer or member of a federal agency; he was not even an elected official. *Compare Circuit City*, 532 U.S. at 120 (declining to put emphasis on testimony by non-member of Congress before a sub-committee: "Legislative intent is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress. It becomes far more so when we consult sources even more removed from the full Congress[.]").

[4] *Compare Valdes v. Swift Transp. Co., Inc.*, 292 F.Supp.2d 524 (S.D.N.Y. 2003)("Section 1 does not, however, in any way address the enforceability of employment contracts exempt from the FAA. It simply excludes these contracts from FAA coverage entirely.")

Second, it is most certainly not the national law of the United States that seamen in particular and transportation workers generally can never be compelled to arbitrate. The FAA and its exemption were enacted in 1925 as positive law to overcome the great judicial hostility towards arbitration clauses which then existed. *Circuit City*, 532 U.S. at 111. In § 1 the FAA states that it will not be the source of such positive law with regard to the limited class of contracts by which transportation workers are employed. However, when a source of positive law does apply to their disputes, transportation workers must arbitrate regardless of § 1. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 477 (1989)("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956)(upholding application of state arbitration law to an arbitration provision in a contract not covered by the FAA); *Palcko v. Airborne Express*, Inc., 372 F.3d 588 (3rd Cir. 2004), *cert denied*, 2005 U.S. LEXIS 448 (U.S., Jan. 10, 2005)(compelling plaintiff to arbitrate under Washington state arbitration statute even though she was a transportation worker within the meaning of 9 U.S.C. §1); *Air Line Pilots Ass'n, Int'l v. Midwest Express Airlines, Inc.*, 279 F.3d 553, 556 (7th Cir. 2002)(pilot employed under collective bargaining agreement which required arbitration could compel employer to arbitrate); *American Postal Workers Postal Workers Union v. United States Postal Service*, 823 F.2d 466, 470-471 (11th Cir. 1987)(enforcing arbitration procedures in postal workers' collective bargaining agreement under 29 U.S.C. § 301 and 39 U.S.C. § 1208 even though the CBA was a transportation workers' "contract of employment" within the meaning of 9 U.S.C. § 1). *Compare U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351 (1970)(but for statutory right of access to courts for his specific type of claim,

ar[illegible]tion clause in seaman's collective bargaining agreement w[illegible] have been enforced under 29 U.S.C. § 301).[5]

This is a consummately international dispute governed by the Convention - *the contracts and arbitration clauses in question were drafted by a foreign government for use by its own citizens.* This Court itself has anticipated situations in which an arbitration clause covered by the Convention would not be enforceable under domestic law, and has expressly stated that in such circumstance domestic law must yield to the Convention:

> [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the needs of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, *even assuming that a contrary result would be forthcoming in a domestic context.*
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> * * *
>
> National courts must shake off the old judicial hostility to arbitration, and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or

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[5] *See also Aasma v. Am. S.S. Owners Mut. Prot. and Indem. Ass'n., Inc.*, 95 F.3d 400 (6th Cir. 1996) (United States seamen must arbitrate asbestos injury claims against insurer of bankrupt shipowner in England); *Ones v. Miss. Valley Barge Line Co.*, 98 F. Supp. 787 (W.D. Penn. 1951)(seaman must arbitrate pursuant to terms of collective bargaining agreement); *see also, O'Dean v. Tropicana Cruises Int'l Inc.*, No. 98 Civ. 4543, 1999 U.S. Dist. LEXIS 7751 (S.D.N.Y. 1999)(interstate transportation worker).

> transnational tribunal. To this extent, at least, *it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.*

Mitsubishi, *supra*, 473 U.S. at 629, 638-39 (emphasis supplied, citations omitted). *Compare Sherk*, *supra*, 417 U.S. at 516-517 (noting that "[a] parochial refusal" by the courts of one country to enforce international arbitration agreements would frustrate the very purposes of the Convention).

This Court has also stated that Congress could, if it chose, exempt certain subjects from the reach of the Convention:

> Doubtless, Congress may specify categories of claims it wishes to reserve for our own courts without contravening this Nation's obligations under the Convention. *But we decline to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so.*

Mitsubishi, 473 U.S. at 639, n. 21 (emphasis supplied). In that vein Congress knows fully well how to bring foreign seamen within the ambit of its domestic statutes and to make courts available to them when it so desires. *See e.g.*, 46 U.S.C. § 10313(i)(expressly extending U.S. seamen's wages statutes to foreign seamen "when in a harbor of the United States" and making the courts "available" to them). The plain and very simple fact is that Congress has never expressly directed our courts to refuse enforcement of arbitration clauses in the employment contracts of *foreign* seamen, let alone to disregard the choice of a foreign sovereign to require its seamen to arbitrate.

IV. CONCLUSION

Petitioner has offered no compelling reasons why this Court should take up this case. The courts below faithfully adhered to well established rules of statutory construction and the overwhelming federal policy in favor of arbitration in holding that the transportation workers exemption in § 1 of the FAA conflicts with the Convention Act. This Court has previously declined to review exactly the same holding. *Francisco v. Stolt Achievement MT*, 293 F.2d 270 (5th Cir. 2002), *cert denied*, 537 U.S. 1030 (2002). Since then nothing has changed; every federal court to address the question has agreed with *Francisco*.

WHEREFORE, Respondent respectfully requests that Petitioner's request for a writ of certiorari be denied.

Respectfully submitted,

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